Filed 10/25/12 P. v Paradez CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN GILBERT PARADEZ,

Defendant and Appellant.

F061321

(Super. Ct. No. VCF232318)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Joseph A. Kalashian, Judge.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez, Eric L. Christoffersen and Christina Hitomi Simpson, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant Kevin Gilbert Paradez stands convicted of 10 counts of attempted premeditated murder and active participation in a criminal street gang. In his appeal, he argued the trial court erred by: (1) refusing to instruct the jury with a requested pinpoint instruction; and (2) imposing a consecutive term for the conviction of active participation in a criminal street gang (Pen. Code,[1] § 186.22, subd. (a)) in violation of section 654. In our opinion filed November 21, 2011, we concluded his claims lacked merit and affirmed.

Paradez filed a petition for review with the California Supreme Court, which was denied in February 2012 without prejudice to any relief to which Paradez might be entitled after a decision in a pending case, *People v. Mesa.* In *People v. Mesa* (2012) 54 Cal.4th 191, 199 (*Mesa*), the California Supreme Court later held that section 654 did not permit separate punishment for the section 186.22, subdivision (a) crime of active participation in a criminal street gang when the only evidence of such participation was the current charged offenses, even if there were multiple objectives. (*Id.* at pp. 199-200.)

Following the *Mesa* decision, Paradez moved to recall the remittitur in this case. We in turn directed a response from the People, who did not oppose Paradez's motion. The People agreed that under *Mesa* the sentence on Paradez's active-participation-in-a-criminal-street-gang conviction should have been stayed under section 654. In light of the *Mesa* decision, the order denying Paradez's petition for review without prejudice, and the People's concession, this court granted Paradez's motion to recall the remittitur and vacated our earlier opinion. We now issue this opinion to grant relief pursuant to *Mesa* and, in all other respects, affirm the judgment.

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[1] References to code sections are to the Penal Code unless otherwise specified.

FACTUAL AND PROCEDURAL SUMMARY

On the afternoon of January 16, 2010, a group of 11 family members and friends gathered in Visalia to play football. The 11 consisted of O.G., R.G., S.B., R.H., J.G., I.G., D.O., J.V., J.M., A.V. Jr., and A.V. Sr.

One of the group, S.B., was taking photographs of the game while the others played football. S.B. saw Paradez approach the players and throw "up a sign" with his hands. S.B. saw Paradez pull out a gun and start running towards the players on the field; S.B. turned to run away. As he was running, S.B. looked back and saw Paradez shooting at the players on the field. S.B. heard 9 or 10 shots. S.B. took photos of Paradez running away from the scene of the shooting with a gun in his hand.

O.G. was on the playing field and heard bullets go past him as he tried to run away. O.G. heard about 10 shots. O.G. was shot in the back and could not identify the shooter. The bullet exited from his chest.

R.G. saw Paradez when he "threw up a sign" and recognized the action as a gang sign. When R.G. saw Paradez run toward the field, he announced to the others that Paradez was going to shoot them. R.G. heard 9 to 10 shots and saw bullets fly past him as he ran away. I.G. heard six to nine shots being fired. I.G. was able to identify Paradez as the shooter.

J.G. saw Paradez fire the first shot. J.G. heard more gunshots as he took off running. R.H. recalled seeing Paradez head toward the football players with a smile on his face and then just start shooting. R.H. heard 8 to 10 shots being fired at the football players. J.V. heard bullets fly past him as he ran away. J.V. estimated he heard nine shots.

D.O. saw Paradez walk up to the football players with his hand behind his back. D.O. heard someone yell "run" and he took off running. D.O. heard six to eight shots fired and saw several bullets strike the ground about 10 to 15 feet from him. J.M. left the park before the shooting began.

A.V. Jr. saw Paradez walk toward the football field and start shooting. As A.V. Jr. was running away, he saw two bullets strike the ground about five feet away. He heard around nine shots. A.V. Sr. also saw Paradez walk toward the football field with his hand behind his back and start shooting. At that point, A.V. Sr. yelled "run." A.V. Sr. saw Paradez fire at everyone in the crowd of players. He heard nine shots, one of which flew by his head.

Marlene Loyoza was at the park with Paradez, Gilbert Reveles, and Daniel Cardenas, when she saw the football players arrive. Loyoza knew Cardenas and Paradez were members of the South Side Kings gang. After the football players arrived, the four of them got into a white vehicle, with Cardenas driving. Loyoza saw Paradez get out of the vehicle and walk back toward the football players. At that point, she exited the vehicle because "I knew nothing good was going to happen." Loyaza heard gunshots as she walked away from the park.

Paradez ultimately was charged with 11 counts of attempted premeditated murder and active participation in a criminal street gang. As to the attempted murder counts, it was alleged that Paradez personally: (1) discharged a firearm causing great bodily injury; (2) inflicted great bodily injury; and (3) committed the offenses on behalf of, at the direction of, or in association with a criminal street gang. As to the criminal street gang count, it was alleged that Paradez personally used a firearm and personally inflicted great bodily injury.

At trial, Visalia Police Officer Dwight Brumley, a member of the gang suppression unit, testified as an expert in criminal street gangs. The South Side Kings is a subset of the Surenos. Paradez was an admitted gang member. Brumley opined that Paradez, Cardenas, and Reveles were active members of the South Side Kings at the time of the shooting.

According to Brumley, the manner in which the shooting occurred was consistent with a Sureno "walk-up" shooting. J.M., one of the initial football players at the park,

was a Norteno gang member. Brumley opined that the shooting was in association with the gang, because Paradez and his fellow gang members were wearing blue, the Sureno color, and J.M. and the football players were wearing red, the Norteno color.

Before the conclusion of trial, the People moved to dismiss one of the attempted murder counts; the trial court granted the motion. The jury found Paradez guilty of all remaining charges and found all enhancements to be true. The trial court imposed concurrent terms of 40 years to life for the attempted murder convictions and enhancements; plus consecutive terms of three years for active participation in a street gang; 10 years for personal use of a firearm, and three years for personally inflicting great bodily injury.

DISCUSSION

Paradez contends his convictions for attempted murder must be overturned because the trial court refused to instruct the jury with his requested pinpoint instruction. He also contends the trial court erred in imposing a consecutive term for the active participation in a criminal street gang conviction and enhancements.

I. Pinpoint Instruction

Paradez requested the trial court instruct the jury with the following pinpoint instruction:

> "A single shot cannot intend to kill more than one person unless you conclude hat [*sic*] more than one person was in the line of fire of the shot and that a bullet could have passed through one person and killed another."

The trial court declined to give the pinpoint instruction. The trial court did not err.

Analysis

The jury was instructed with CALCRIM No. 600, attempted murder. In relevant part, that instruction stated:

> "A person may intend to kill a specific victim or victims and at the same time concurrently intend to kill everyone. In order to convict the defendant of the attempted murders of [each of the alleged victims], the People must

> prove that the defendant not only intended to kill one of these people but also either intended to kill some, or intended to kill everyone. If you have a reasonable doubt whether the defendant intended to kill any one particular person or intended to kill any one particular person by killing everyone, then you must find the defendant not guilty of the attempted murder of those people who you find that he did not intend to kill."

This language is designed for use in cases where the prosecution theory of the case is that the defendant created a "kill zone." (Bench Notes to CALCRIM No. 600.) A person who shoots at a group of people may be found guilty of the attempted murder of everyone in the group, even if he or she primarily targeted only one of them, if the person also, concurrently, intended to kill others within what has been termed the "kill zone." (*People v. Bland* (2002) 28 Cal.4th 313, 329 (*Bland*).)

Paradez's pinpoint instruction was directed at the "kill zone" theory of the case asserted by the prosecution. Paradez "proposed an instruction focusing on the conflicting evidence of how many shots were fired as that relates to specific intent to kill." We take this to mean that Paradez's position is that the number of attempted murder counts of which he could potentially be convicted had to equate exactly to the number of bullets he fired. This, however, is not an accurate statement of the law. A shooter who fires a single bullet in the direction of two potential victims can be found guilty of two counts of attempted murder. (*People v. Smith* (2005) 37 Cal.4th 733, 744.)

"[A] shooter may be convicted of multiple counts of attempted murder on a 'kill zone' theory where the evidence establishes that the shooter used lethal force designed and intended to kill everyone in an area around the targeted victim (i.e., the 'kill zone') as the means of accomplishing the killing of that victim. Under such circumstances, a rational jury could conclude beyond a reasonable doubt that the shooter intended to kill not only his targeted victim, but also all others he knew were in the zone of fatal harm. [Citation.]" (*People v. Smith, supra,* 37 Cal.4th at pp. 745-746.) Where the means employed to commit the crime against a victim creates a zone of harm around that victim, the jury can reasonably infer that the defendant intended that harm to all who are in the

anticipated zone. (*People v. Vang* (2001) 87 Cal.App.4th 554, 563-564.)

Contrary to Paradez's contention, the proffered pinpoint instruction is not a rational extension of the holding of *People v. Perez* (2010) 50 Cal.4th 222, 225, 230-231, where the California Supreme Court concluded that the indiscriminate firing of a *single* shot at a group of persons, without more, does not amount to attempted murder of everyone in group. Here, four witnesses heard up to 10 shots. Other witnesses remembered hearing multiple shots, but fewer than 10 shots. All the evidence established that multiple shots were fired at the group; multiple victims heard and felt bullets going by them as they ran away; multiple witnesses saw Paradez firing at different members of the group playing football.

In *People v. Vang*, *supra*, 87 Cal.App.4th 554, the defendants shot at two occupied houses. The Court of Appeal affirmed attempted murder charges as to everyone in both houses (11 counts) even though the defendants may have targeted only one person at each house. "The jury drew a reasonable inference, in light of the placement of the shots, the number of shots, and the use of high-powered, wall-piercing weapons, that defendants harbored a specific intent to kill every living being within the residences they shot up. . . . The fact they could not see all of their victims did not somehow negate their express malice or intent to kill as to those victims who were present and in harm's way, but fortuitously were not killed." (*Id.* at pp. 563-564; see also *People v. Gaither* (1959) 173 Cal.App.2d 662, 666-667 [defendant mailed poisoned candy to his wife; convictions for administering poison with intent to kill affirmed as to others who lived at the residence even if not a primary target].)

Paradez fired multiple bullets; he was seen pointing the gun in different directions as the football players attempted to flee the scene of the shooting. "[T]o be found guilty of attempted murder, the defendant must either have intended to kill a particular individual or individuals or the nature of his attack must be such that it is reasonable to infer that the defendant intended to kill everyone in a particular location as the means to

some other end, e.g., killing some particular person." (*People v. Anzalone* (2006) 141 Cal.App.4th 380, 393.)

The pinpoint instruction was not an accurate statement of the law regarding attempted murder on a "kill zone" theory and the trial court was correct in refusing to instruct the jury with the pinpoint instruction for this reason alone.

If we assume for purposes of argument that Paradez's proffered instruction was an accurate statement of the law, it does not follow that the trial court erred in refusing the instruction. The quoted portion of CALCRIM No. 600 set forth above instructs on the kill zone theory of attempted murder. A trial court need not give a pinpoint instruction if it is argumentative, duplicative, or unsupported by the evidence. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 99; *People v. Barajas* (2004) 120 Cal.App.4th 787, 791.)

As was explained in *Bland*, "This concurrent intent [i.e., 'kill zone'] theory is not a legal doctrine requiring special jury instructions . . . ." (*Bland, supra*, 28 Cal.4th at p. 331, fn. 6.) The pinpoint instruction proffered by Paradez, if accurate, would have been duplicative of the CALCRIM No. 600 instruction.

Therefore, we conclude the trial court did not err in refusing to instruct the jury with Paradez's pinpoint instruction.

II. Consecutive Term

Paradez contends the trial court erred in imposing a consecutive term for the offense of active participation in a criminal street gang, contending the term should have been stayed under section 654. Paradez is correct.

Analysis

Section 654, subdivision (a), states: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

As previously mentioned, the California Supreme Court in *Mesa*, held that section 654 does not permit separate punishment for the section 186.22, subdivision (a) crime of active participation in a criminal street gang when the only evidence of such participation was the current charged offenses, even if there were multiple objectives. (*Id.* at pp. 199-200.)

In this case, Paradez was charged in count 12 with violating section 186.22, subdivision (a). The only evidence of his active participation, however, was the evidence associated with the other charged offenses. Pursuant to *People v. Mesa, supra,* 54 Cal.4th at page 199, the superior court should have stayed the term it imposed on count 12.

DISPOSITION

The matter is remanded to the trial court with directions to: (1) stay imposition pursuant to section 654 of the term imposed for the count 12 offense; (2) amend the abstract of judgment to reflect the section 654 stay of the punishment for the count 12 offense; and (3) forward a copy of the modified abstract of judgment to the appropriate authorities. In all other respects, the judgment is affirmed.

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LEVY, Acting P.J.

WE CONCUR:

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CORNELL, J.

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FRANSON, J.